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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT CORYDON, NOVEMBER TERM, 1821, IN THE SIXTH YEAR OF THE STATE.

THE Case of MARY CLARK, a Woman of Color.

[Reported in 12 Am. Dec. 213.]

CONTRACT OF SERVITUDE.—*Specific Performance.*—*Habeas Corpus.*—A free woman of color above 21 years of age bound herself by indenture in this State, for a valuable consideration, to serve the obligee as a menial servant for 20 years: *Held.* that a specific performance of the contract could not be enforced; and that, upon a writ of *habeas corpus*, she had a right to be discharged from custody.

SAME.—An application to be discharged on *habeas corpus* proves the service to be involuntary within the meaning of the Constitution.

FOREIGN CONTRACT BY NEGRO.—An indenture, executed out of this State by a negro or mulatto, is void; and can neither be specifically enforced, nor made the foundation of an action for damages.

CONTRACT OF SERVITUDE.—It is a general rule, that covenants for personal service cannot be specifically enforced, either at common law, or by Statute. The case of apprentices depends on parental authority; that of soldiers and sailors on national policy. (a)

From the Knox Circuit Court.

HOLMAN, J.—In obedience to a writ of *habeas corpus*, issued by the Knox Circuit Court, G. W. Johnson brought before that Court the body of Mary Clark, (a woman of color,) said to be illegally detained by him; and assigned as the cause of her detention, that she was his servant by indenture, executed at Vincennes, in this State, on the 24th of October, 1816: which indenture is set out in the return, regularly executed and

(a) *Ikerd v. Beavers*, 106, Ind. p. 486.

acknowledged [123] edged, by which the said Mary (being a free woman) voluntarily bound herself to serve him as an indentured servant and house maid for 20 years. This cause of detention was deemed sufficient by the Circuit Court, and said Mary remanded to the custody of the said Johnson. She has appealed to this Court.

This application of Mary Clark to be discharged from her state of servitude, clearly evinces that the service she renders to the obligee is involuntary; and the Constitution, having determined that there shall be no involuntary servitude in this State, seems at the first view to settle this case in favor of the appellant. But a question still remains, whether her service, although involuntary in fact, shall not be considered voluntary by operation of law, being performed under an indenture voluntarily executed. This indenture is a writing obligatory. The clause in the 7th section of the 11th article of the Constitution, that provides that no indenture hereafter executed by any negro or mulatto without the bounds of this State, shall be of any validity within this State, has no bearing on it. An indenture executed by a negro or mulatto out of this State, is by virtue of this provision, absolutely void; and can be set up neither as a demand for the services therein specified, nor as a remuneration in damages for a non-performance. But the Constitution, having confirmed the liberty of all our citizens, has considered them as possessing equal right and ability to contract, and, without any reference to the color of the contracting parties, has given equal validity to all their contracts when executed within the State. We shall, therefore, discard all distinctions that might be drawn from the color of the appellant, and consider this indenture as a writing obligatory, and test it, in all its bearings, by the principles that are applicable to all cases of a similar nature. It is a covenant for personal service, and the obligee requires a specific performance. It may be laid down as a general rule, that neither the common law nor the statutes in force in this State recognize the coercion of a specific performance of contracts. The principal, if not the only exceptions to this general rule, are statutory provisions, few, if any, of which are applicable to this State, and none of them has any bearing on this case. Apprentices are compellable to a specific performance of the articles of apprenticeship, but their case rests on principles of a different nature. They are not considered as performing a contract of their own, but acting in conformity [124] to the will of those whose right and duty it was to exact obedience from them. That right and duty existed by nature in the parent, and are, by legal regulations, transferrable to the master during the minority of the

child: and when transferred, either by the parent, or those who stand *in loco parentis*, the duty of obedience arises, and is enforced on the ground of parental authority, and not on the principle of a specific performance of contracts, and cannot be urged as an exception to the general rule, that the coercion of a specific performance of contracts is not contemplated in law. The case of soldiers and sailors depends on national policy, and cannot be used in the elucidation of matters of private right.

There are some covenants that may be specially enforced in equity; but they are of a very different nature from the contract before us. They are mostly covenants for the conveyance of real estate, and in no case have any relation to the person. But if the law were silent, the policy of enforcing a specific performance of a covenant of this nature, would settle this question. Whenever contracting parties disagree about the performance of their contract, and a Court of justice of necessity interposes to settle their different rights, their feelings become irritated against each other, and the losing party feels mortified and degraded in being compelled to perform for the other what he had previously refused, and the more especially if that performance will place him frequently in the presence or under the direction of his adversary. But this state of degradation, this irritation of feeling, could be in no other case so manifestly experienced, as in the case of a common servant, where the master would have a continual right of command, and the servant be compelled to a continual obedience. Many covenants, the breaches of which are only remunerated in damages, might be specially performed, either by a third person at a distance from the adversary, or in a short space of time. But a covenant for service, if performed at all, must be performed under the eye of the master; and might, as in the case before us, require a number of years. Such a performance, if enforced by law, would produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery; and if enforced under a government like ours, which acknowledges a personal equality, it would be productive of a state of feeling more discordant and irritating than [125] slavery itself. Consequently, if all other contracts were specifically enforced by law, it would be impolitic to extend the principle to contracts for personal service. Very dissimilar is the case of apprentices. They are minors, and for the want of discretion, are necessarily under the control of parents, guardians, or masters; and obedience is exacted from them, whether considered as children, wards, or apprentices. They are incapable of regulating their own conduct, and are subjected by nature and by law to the government of others; and that govern-

ment, instead of humbling and debasing the mind, has a tendency to give it a regular direction, and a suitable energy for future usefulness. But it is not the master who in this case applies for legal aid. He has not appealed to a Court of justice to obtain a specific performance of this indenture. All he asks from the constituted authorities is, that they would withhold their assistance from his servant. Does this alter the case in his favor? Is it more consistent with good policy, that a man possessing the power, should be left to enforce a specific performance of a contract in his own behalf, than that the officers of justice, on a full consideration of his case, should enforce it for him? These questions are not only easily answered in the negative, but their reverse is unquestionably true. Deplorable indeed would be the state of society, if the obligee in every contract had a right to seize the person of the obligor, and force him to comply with his undertaking. In contracts for personal service, the exercise of such a right would be most alarming in its consequences. If a man, contracting to labor for another a day, a month, a year, or a series of years, were liable to be taken by his adversary, and compelled to perform the labor, it would either put a stop to all such contracts, or produce in their performance a state of domination in the one party, and abject humiliation in the other. We may, therefore, unhesitatingly conclude, that when the law will not directly coerce a specific performance, it will not leave a party to exercise the law of the strong, and coerce it in his own behalf. A state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary either in fact or in law. It presents a case where legal intendment can have no operation. While the appellant remained in the service of the obligee without complaint, the law presumes that her service was voluntarily performed; but her application to the Circuit Court to be [126] discharged from the custody of her master, establishes the fact that she is willing to serve no longer; and, while this state of the will appears, the law can not, by any possibility of intendment, presume that her service is voluntary. The case of an apprentice presents a different state of things. The minor is considered as having no legal will. He has neither the power nor the right of choosing, whether he will obey or disobey the commands of his master. The law, therefore, on account of the immaturity of his will, can not presume that any of his services are involuntarily performed. The appellant in this case is of legal age to regulate her own conduct; she has a right to the exercise of volition; and, having declared her will in respect to the present service, the law has no intendment that can contradict that declaration. We must take the fact as

it appears, and declare the law accordingly. The fact then is, that the appellant is in a state of involuntary servitude; and we are bound by the constitution, the supreme law of the land, to discharge her therefrom.

Per Curiam.—The judgment is reversed with costs, and the woman discharged.

Dewey, for the appellant.

Call, for the appellee.

OSBORNE and Another v. REED.

ACTION ON BOND.—In an action on a penal bond, the defendant has a right on oyer, to a copy not only of the bond, but of the condition; and of every other part of the obligation, even to the attestation and names of the witnesses, if required. (a)

ERROR.—*Denial of Oyer.*—To deny oyer where it ought to be granted is error. (b)

ERROR to the Franklin Circuit Court.

In this case there was a general demurrer to the declaration, and judgment for the plaintiff below, the defendant in error.

BLACKFORD, J.—Debt on a penal bond, of which profert is made in the declaration. The defendants craved oyer of the bond, and it was granted. They then craved oyer of the condition of the bond, but this was denied by the Court below. Where the plaintiff declares upon a deed, and makes profert of it, the defendant has a right, on oyer, to a copy of every part of the obligation, even to the attestation and names of the witnesses, if required. [127] *Longmore v. Rogers*, Willes, 288. Formerly the deed remained in Court all the term in which it was shown, subject to the defendant's inspection. *Wymark's Case*, 5 Co. 74. And this is supposed still to be the case, for every purpose beneficial to the defendant. *Longmore v. Rogers*, Willes, 288. —*Thoresby v. Sparrow*, 1 Wilson 16. When oyer is denied where it ought to be allowed, it is an error of the Court, for which their judgment will be set aside. *Longueville v. Thistleworth*, 2 Ld. Raym. 970.—1 Wils. 16 (1). In the case before us, the record shows that there was a condition to the bond on which the action was founded, and that oyer of the condition was craved in proper time, but the Court refused to grant it. Thus a ma-

(a) See note (b) to *Cole v. Driskell*, ante, p. 16.

(b) *State v. Hicks*, 2 Blackf. 336.

terial part of the cause of action was kept from the defendant's knowledge. He was denied information to which the law entitled him, and without which it was not to be expected that he could make his defense.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the demand of oyer of the condition of the bond are set aside, with costs. Cause remanded for further proceedings.

Caswell, for the plaintiffs.

Test, for the defendant.

(1) But if oyer be granted to a party not entitled to it, he cannot assign that for error. 2 Ld. Raym. 970, *supra*.

FITE v. DOE, on the several Demises of Bingham and Others.

CONVEYANCE OF REALTY HELD ADVERSELY.—*Maintenance.*—The conveyance of real property, if there be an adverse possession at the time, is void at common law as an act of maintenance. (a)

SAME.—*Time.*—A conveyance, executed in pursuance of a previous contract, can not relate back to the date of the contract to the prejudice of strangers. (b)

SAME.—*Record.*—If A. convey land to B. by a deed, which is regularly recorded, and afterwards convey the same to C., the possession of the latter, claiming only under his deed from A., cannot be set up as adverse either to defeat a subsequent conveyance by B., or by any person claiming under B. (c)

EJECTMENT.—*Judgment.*—*Omission.*—An omission of the *quod recuperet* term-

(a) *Martin v. Pace*, 6 Blackf. 99.—*Michael v. Doe*, 1 Ind. 481; See cases cited in *Mix v. Ellsworth*, 5 Ind. 517.—*Major v. Brush*, 7 id. 222.—*Pitcher v. Laycock*, id. 398.—*Patterson v. Nixon*, 79 Ind. 251.—See *Ft. Wayne &c., R. Co. v. Mellett*, 92 Ind. 535. Judicial sales are not affected by adverse possession, nor are they within the policy of the champerty law. *McGill v. Doe*, 9 Ind. 306; *Washburn on Real Prop.* p. 38, § 96. Although the possession, and improvements of a purchaser do not constitute actual notice of an unrecorded deed, within the terms of the statute, still they make such an adverse possession as will render the subsequent conveyance void at common law. *Hubbard v. Smith*, 2 Mich. 207. See, 1 Hilliard on Vend. p. 405.

(b) An executory contract does not, at law, pass the title to the property. Hilliard on Vend. p. 3, § 7. Distinguished in *Ashley v. Eberts*, 22 Ind. 58.—See *German &c., Ins. Co. v. Grim*, 32 Ind. 256.

(c) Touching adverse possession. See Greenleaf's Cruise, vol. 3, p. 436, 438.